IN THE

Supreme Court of the United States

October Term, 1941

No. 945

HARTFORD FIRE INSURANCE COMPANY,

Petitioner,

vs.

MARTIN LEITHAUSER, AS ADMINISTRATOR OF THE ESTATE OF P. J. LEITHAUSER, DECEASED,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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FOREWORD

An "action" to recover upon the fire policy involved has been prosecuted steadily since March 4, 1931, or for just eleven years. A patient effort has been made to secure justice.

A milestone in that effort was reached on October 7, 1942, when the United States Circuit Court of Appeals decided that the policy could be reformed to express the true agreement of the parties. The opinion of Judge Hicks, reported in 124 F. (2d) 117, appears in the record herein at page 154.

That opinion is masterful. It reflects a combination of rare common sense and profound understanding of law and equity. It is meticulous in its analysis; exhaustive in its treatment of the germane facts and of the cases that are pertinent or controlling; flawless in form and diction.

In commenting upon and replying to the petition for writ of *certiorari* and brief in support thereof, respondent will refer to the headings and page numbers used by petitioner in its brief. Upon many parts, comment would seem unnecessary.

On January 28, 1930, petitioner issued its third of three identical policies in three consecutive years, insuring against loss by fire an elevator building that was located on land leased from a railroad company. In the daily report executed by its agent with each of said policies was a written notice received by the company's home office, stating that the building was on leased land. The premiums were paid and accepted when each of said policies was issued. The daily reports were not physically attached to the policies but upon them were the notations: "Attached to and forming part of Policy No.....," with the appropriate number indicated (R. 28).

The insurance company refused to pay the loss of $10,000 for the reason that the policy contained a printed provision that it was to be void if the building was "on ground not owned by the insured in fee simple."

Judge Hicks expresses the underlying equity in favor of the respondent in the following words (R. 157):

> **"We think that the testimony clearly establishes that it was the mutual intention of the parties to effect a contract of insurance upon the elevator regardless of the provision in the policy which ren-**

dered it void unless Leithauser's interest was that of sole and unconditional ownership in fee simple. Any contrary inference is inconsistent with the commonly accepted principles of fair dealing. When appellee issued the original policy and accepted the premium therefor it knew that the elevator was on ground leased from the B. & O. Railroad Company. When it issued the second and third policies and accepted the premiums it had the same information. There is no ambiguity nor uncertainty in the words, 'Same as before.' ''

I. PETITIONER'S SUMMARY STATEMENT OF THE CASE

(Pp. 1-5)

(1) In the District Court this case was finally submitted and considered as "fully tried upon the pleadings and the evidence" and the court found "the issues in favor of the defendant" (Order, R. 92). Plaintiff's initial request that only the issue of reformation be tried was overridden by the court. In the "Findings of Fact" of the District Court (R. 92) which petitioner says (p. 2) it adopts is the following statement:

> "The issues in the above entitled suit having been duly joined upon the pleadings, consisting of the petition of the plaintiff, the answer of the defendant and the reply of the plaintiff, and the case having been fully heard upon the evidence introduced by both parties **and submitted upon the merits to the Court,**" etc.

In petitioner's first brief, filed in this case in the Court of Appeals, at page 50, it is stated:

> "But we do not have that situation. An answer was filed. The issues were made up and the case tried upon the merits. The court below, therefore,

was entirely relieved from any obligation, in law or comity, to follow the erroneous decision of Judge Jones."

Again, at page 46 of its said brief, petitioner said:

"The law is well settled that the trial court in disposing of this case upon the merits was not bound by the interlocutory views of Judge Jones. The trial court had to take the responsibility for whatever judgment was entered. *Judge Kloeb heard the case on the merits, and rendered a final, appealable judgment in the case.*"

Thus, it will be observed, petitioner's statement on page 2 that "the only issue considered upon its merits was that of reformation" is inaccurate. Petitioner's counsel who prepared the order (R. 92) and the judge who signed it must have understood that the so-called chattel mortgage issue was without merit and was abandoned.

(2) The "other proceedings" to which the order of the Circuit Court of Appeals (R. 183), dated Jan. 12, 1942, refers in its amended opinion are the findings and entries to be made by the District Court after remand when it renders final judgment in favor of plaintiff upon the policy as reformed. The alleged chattel mortgage issue is completely disposed of by Section 9583 of the General Code of Ohio, and by *Insurance Company vs. Leslie*, 47 O. S. 409. That issue is wholly without merit or substance.

Respondent's Statement of Facts

Respondent adopts the findings of facts made by Judge Hicks in his opinion as our statement of facts (R. 154-161). It would be impossible to make a more accurate or a more succinct statement of what the evidence shows.

II. PETITIONER'S STATEMENT OF THE QUESTIONS PRESENTED

(Pp. 6-7)

1. The statement by petitioner that the policy limitation of twelve months is valid and enforceable "under the settled law of Ohio, as announced by its highest court" is misleading, as we will point out later. (*Infra*, p. 11.)

2. The Circuit Court of Appeals did not "ignore and refuse to follow the construction and application" of Section 11233 of the General Code as settled by the Ohio courts. It simply refused to follow petitioner's erroneous construction of the statutes and laws of Ohio.

3. The question of *res adjudicata* was ably disposed of in the Circuit Court of Appeals. It pointed out that the Supreme Court had completely settled that question in *Northern Assurance Co. vs. Grandview Bldg. Ass'n*, 203 U. S. 106.

4. The question of estoppel by election of remedies was also finally settled by this court in said last mentioned case, and the law was established contrary to the contentions of petitioner herein. In said case, the second action, which was to reform the policy, was brought nearly five years after the fire, and it was upheld notwithstanding the contractual limitation of twelve months which was contained in the policy.

III. PETITIONER'S REASONS RELIED UPON FOR ALLOWANCE OF WRIT OF CERTIORARI

(Pp. 7-11)

1. (Page 8) In citing *Appel vs. Cooper Ins. Co.*, 76 O. S. 52, the defendant still refuses to distinguish that case from the case at bar, and to give force to the rule as stated in the syllabus therein that the time limitation for com-

mencing suit will be enforced *"where no extrinsic facts are alleged excusing delay in bringing the suit." Section 11233 General Code,* was not involved in *Appel vs. Cooper Ins. Co.* and there were no extrinsic facts excusing the delay in bringing that suit.

2. (a) (Page 8) Judge Paul Jones, of the United States District Court of Cleveland, Ohio, held in the case at bar, that the first *Leithauser* case was not determined on its merits and that it was determined "otherwise than on its merits." This position was upheld by the United States Circuit Court of Appeals in the decision against which this petition for writ of *certiorari* is directed. The cases cited by petitioner at the bottom of page 8 are clearly not in point.

2. (b) (Page 9) The petitioner, by an attempted juggling with the meaning of "cause of action" and of "action," here endeavors to show why *Section 11233, G. C.,* does not apply. It will be noted by the language of *Section 11233, G. C.,* that the word *"action"* is used, not *"cause of action."* Under the Ohio General Code, there is but one action and that is known as a "civil action." The action in the case at bar is an action to recover a loss under an insurance policy. The methods used to effect that recovery are called "remedies." Sometimes "cause of action" is used in the sense of "remedy." Where the Circuit Court of Appeals stated in the third from the last paragraph of the opinion that the present suit was not the same "cause of action," it obviously meant that it was not the same remedy. The cases cited, *Larwill vs. Burke, Piscopo, Admr., vs. Railway Co., Price vs. Kobacker Furn. Co., Brown vs. Erie Railroad Co.,* on page 9 of petitioner's brief, do not at all bear out the claims which the petitioner makes. They can each be readily distinguished. In *Larwill vs. Burke,* for example, the parties in the second action were

not the same as in the first action. These and similar cases were fully presented to the Circuit Court of Appeals and they furnish no authority whatsoever for the granting of this petition for writ of *certiorari.*

2. (c) (Page 9) The two cases *Prudential Ins. Co. vs. Howle,* 19 O. C. C. 621, and *Riddlesbarger vs. Hartford Fire Ins. Co.,* 74 U. S. 386, have been cited and presented by the petitioner in all previous hearings. The opinion in the Circuit Court of Appeals takes care of *Prudential Ins. Co. vs. Howle.* So also does the contrary decision of *Cortesi vs. Firemen's Fund Ins. Co.,* 5 O. App. 109, upon the appeal of which the Supreme Court of Ohio refused to grant plaintiff's motion to certify the record. The *Cortesi* case is exactly in point with the case at bar. The *Riddlesbarger* case is taken care of by *Northern Assurance Co. vs. Grandview Building Ass'n,* 203 U. S. 106. We have examined all the old briefs filed in the last named case and find that the *Riddlesbarger* case was strenuously urged therein in support of the insurance company's claim that the statute must give way to a contractual limitation for the commencement of an action. The Supreme Court of the United States definitely refused to follow that doctrine and ignored the *Riddlesbarger* case in its opinion.

3. (Page 9) Here again, the cases cited by the petitioner upon the subject of *res adjudicata* are not responsive to the issues in the case at bar. Judge Hicks, after quoting from *Northern Assurance Co. vs. Grandview Building Ass'n* (*supra*), said:

> "This is enough to say on the question of *res adjudicata.*"

No argument of the respondent herein can better express the fallacies in the arguments which the petitioner makes upon the subject of *res adjudicata* than does the opinion of the United States Circuit Court of Appeals.

4. (Page 10) The opinion of Justice Holmes of this court, in *Northern Assurance Co. vs. Grandview Building Ass'n* (*supra*) also fully answers all of petitioner's contentions with respect to an estoppel by election of remedies.

The *Northern Assurance Company* case is so nearly like the case at bar in its major aspects that it affords a perfect precedent. The case at bar was ably analyzed by the Honorable Paul Jones, District Judge, in his opinion filed October 29, 1936, when he overruled defendant's motion to dismiss this action. We quote from his opinion as follows (R. 33):

> "**An action upon the policy was commenced within the time limited by the terms of the policy. The action was dismissed by the final order of the United States Supreme Court for failure otherwise than upon the merits. This suit was commenced within the statutory time limited for commencing such suits so dismissed by court action. The better weight of authorities supports the view that one who has mistaken his remedy may try again. If the plaintiff can prove that the Defendant Company knew, or its responsible agents understood, that the policy covered property of the plaintiff upon leased ground, the defendant must be held to have issued a policy not in accordance with the agreement and intention of the parties, and reformation would be in order. A mistake which required the clarifying finality of a Supreme Court Order, and not lack of activity upon the part of the plaintiff, has caused delay. A mistake which it is asserted was made in the policy requires the initial consideration of the District Court. I think that the plaintiff, under the facts and the law, is entitled to a determination on the merits of his right to reform the policy to express the true**

contract which the parties understood was executed, or intended to be executed, and, if successful, to enforce his claim in law. This is not to abrogate the voluntary agreement between the parties, but constitutes a patient effort to do justice under law which, it seems to me, affords that opportunity."

IV. PETITIONER'S ARGUMENT

(Page 15)

1. Petitioner's statement that, in Ohio, the law is clearly settled by the case of *Appel vs. Insurance Co.*, 76 O. S. 52, requires qualification. As stated in the second paragraph of the syllabus, quoted on page 16 of petitioner's brief, the policy limitation is upheld only "where no extrinsic facts are alleged excusing delay in bringing the suit." In the case at bar, the delay in bringing the second action was no fault of the plaintiff. Having brought the first action in the state court within twelve months and under the law as laid down in *Foster vs. Insurance Co.*, 101 O. S. 180, plaintiff was compelled to pursue the remedy adopted until it secured the finality of a decision by the Supreme Court of the United States. The case of *Bartley vs. National Business Men's Assn.*, 109 O. S. 583, cited on page 16 of petitioner's brief is not in point. It did not involve Section 11233, G. C., and there were no extrinsic facts alleged excusing delay in bringing suit. Likewise, the case of *Pennsylvania Co. vs. Shearer*, 75 O. S. 249, is not applicable.

The old case of *Riddlesbarger vs. Hartford Fire Ins. Co.*, 74 U. S. (Wall.) 386, is not controlling or even applicable to the case at bar. The case of *Northern Assurance Co. vs. Building Assn.*, 203 U. S. 106, was followed by the Circuit Court of Appeals despite the arguments now presented by the petitioner.

The Riddlesbarger Case and The Northern Assurance Co. Case

The case of *Riddlesbarger vs. Hartford Fire Ins. Co.* was assiduously presented and argued by counsel for the Northern Assurance Co. in their briefs filed in the case reported in 203 U. S. 106. **The same arguments were presented by the Insurance Company's brief as to the controlling effect of the Riddlesbarger case as are now presented by counsel for petitioner, and were in part as follows:**

> "The court nearly forty years ago put this question at rest in the well considered case of *Riddlesbarger vs. Hartford Fire Ins. Co.*, 7 Wall. 386. In that case, Mr. Justice Field, speaking for the unanimous court, used language which has been frequently quoted by the courts of the country, and is now woven into the jurisprudence of America. With reference to a similar clause in a fire insurance policy which had been attacked as against public policy, he said: 'The rights of the parties flow from the contract. That relieves them from the general limitations of the statute.' *Miller vs. Insurance Co.*, 54 Neb. 121. *Ins. Co. vs. Drennan*, 56 Neb. 623. These cases were approved and expressly followed by the Supreme Court of Nebraska and these cases held the contract provision could not take precedence over statute of limitations."

The *Riddlesbarger* case was, in the *Northern Assurance* case, in effect overruled by the Supreme Court, or at least considered inapplicable.

The *Riddlesbarger* case is not applicable or controlling in the case at bar for two reasons:

(1) In that case, the plaintiff had voluntarily dismissed his action and it was sufficient for a decision in that case for the court to hold, as it did hold, that the *voluntary* dismissal was not within the purview of the statute of Missouri which was similar to Section 11233 of the General Code of Ohio. Accordingly, it was unnecessary for the

court to make any declaration that the contractual limitation in the policy took precedence over the statute of limitations.

(2) The statement in the opinion in the *Riddlesbarger* case that the contractual limitation in the policy took precedence over a pre-existing relief statute of Missouri that was similar to Section 11233 of Ohio is contrary to all equity jurisprudence, and particularly to the law as announced by the Supreme Court of Ohio, citing *Leslie vs. Ins. Co.* (*supra*).

Upon the latter proposition, we cannot do better than to quote the language used by counsel for Building Association in their brief at page 73, in the *Northern Assurance Co. vs. Building Ass'n* (203 U. S. 106):

> "On such facts, what is the law? All persons must take notice of the public laws and conform thereto; and if, on entering into a contract, a provision is employed that is repugnant to the public law then in force, it is the unlawful clause in the contract, and not the statute, which must yield. In such case, it is the will of the law-making power of the state, and not that of the individual making a subsequent contract, which is paramount. Otherwise, the state would be without power to promulgate general rules touching any matter which may be the subject of contract. For individuals might subsequently contract contrary to the terms of the public statute, and by invoking the constitutional provisions against impairment of contracts, overthrow the previously enacted statute, in order to uphold the contract. The will of the individual, by such a construction, would thus be made paramount to that of the legislature; and the powers of local government, reserved by the constitution of the states, would be annihilated. This court, however, has not construed the constitutional provision in question to thus cripple the legislative power of the state."

In the *Riddlesbarger* case, the plaintiff did not bring his facts within the Missouri statute which provided for the extension of one year within which to bring another suit *provided the plaintiff* "suffered a non-suit in the first action." Upon this point, we quote from the brief of Hartford Fire Ins. Co., which it filed in that suit (Brief, p. 29):

> "The plaintiff in that suit (referring to the first action) went out of court under no order or judgment, nor by reason of any defect in form or remedy. The defendant answered to the merits and the plaintiff *voluntarily* and without cause dismissed his suit."

This position of the defendant was upheld by the Supreme Court, and the decision on this point was sufficient in itself to resolve the suit in favor of the insurance company. The balance of the decision in regard to declaration that the contractual limitation overrode the statutory provision may well be regarded as *obiter dictum.*

In the *Northern Assurance Company* case, the Supreme Court, while obviously refusing to follow the doctrine of the *Riddlesbarger* case, which was decided way back in 1869, adopted a course that would avoid an express repudiation of the earlier case by simply saying in the opinion:

> "A question argued as to the obligation of the contract having been impaired by a statute as construed, was not taken below and is not open here."

The fact remains that the question whether the contractual limitation in the policy barred the new action was distinctly taken below (in the Supreme Court of Nebraska), and also in the Supreme Court of the United States. The silence of the Supreme Court on this point constituted as effective a repudiation of the Riddlesbarger doctrine as if the court had delivered an express reversal. **Regardless of**

the constitutionality or unconstitutionality of the Nebraska statute, the Supreme Court was confronted with the bar of the contractual limitation in the policy, and it refused to give any force or effect to that contractural limitation although, as before stated, the point was most vigorously presented to the court by the plaintiff in error.

The Nebraska policy contained exactly the same provision as to limitation of action as that involved in the case at bar. The Supreme Court of Nebraska, in its opinion in the *Northern Assurance Co.* case (102 N. W. 249), spoke as follows:

> "The defendant contends that this action is barred by a limitation written in the policy and by the statute."

Petitioner's claim that the application of Section 11233 of the General Code of Ohio is in conflict with the Ohio decisions (p. 17) is wholly unfounded:

(a) The first or prior action in the case at bar failed otherwise than upon the merits. It is clearly established by the law in the case of *Northern Assurance vs. Grand View Building Assn.* that the decision in the prior action was not *res adjudicata* and was not a decision on the merits.

Original Action Failed Otherwise Than Upon Its Merits

After following Justice Holmes' opinion that the first decision was not *res adjudicata* and that in the former action plaintiff failed otherwise than upon the merits, the way is open for the application of Section 11233 of the General Code of Ohio. If the former decision was not *res adjudicata*, then manifestly there was no final adjudication upon the merits; conversely, if the former action had failed upon its merits, there would have been a final adjudication.

As Justice Holmes said, the former decision simply decided "that the contract could not be recovered upon as it stood or be helped out by any doctrine of the common law"; and again, that "the former decision, of course, is not an adjudication that the contract cannot be reformed."

The claim, the right to recover upon the policy, was not decided upon its merits. According to the law, as then announced by the Supreme Court and before the decision of *Erie Railroad Co. vs. Tompkins*, plaintiff was not permitted, in the action as brought, to bring into the case all the facts, and particularly the controlling fact that the defendant had received formal typewritten notices for three successive years that the elevator was located on leased land. In truth, the record shows that the original case was decided against the plaintiff because of his inability to make proof of these formal notices, and for no other reason. Because of a technical rule of law or procedure, the parol evidence rule; because of a rule which barred the application of the doctrine of equitable estoppel, the plaintiff was deprived of the benefit of a controlling fact, to-wit, the controlling fact that the insurance company had formal notice upon its own printed forms of the fact that the elevator was located upon land not owned by the assured in fee simple, and therefore, knew that it was issuing a policy of insurance to cover an elevator located upon leased land.

How, in justice, can it be said that a claim has been decided upon its merits when a controlling fact is barred out because of a procedural technicality?

Plaintiff's broad claim was the right to recover upon a contract of insurance. Technically, the policy itself was not in such form as to permit a recovery at law. It omitted to express a controlling fact or term or condition and for that reason it did not completely and fully express the intention of the contracting parties. The Supreme Court

finally held that, without the admission of that controlling fact in evidence, the defendant was free from liability.

That also was exactly the holding in the case of *Northern Assurance Co. vs. Building Association,* 203 U. S. 106. Plaintiff in that case was permitted to try again because it had misconceived its remedy; because, like the plaintiff in the case at bar, it had therefore been deprived of a trial on the merits; because it had been unable to bring into operation a fact, a controlling fact, which, if done, would have produced an opposite decision of the case. The controlling fact in that case which was barred out in the action at law was that the duly authorized agent knew that there was concurrent insurance.

As stated in Ruling Case Law, Vol. 23, p. 348, par. 44:

> **"By the better rule, equity will give the party relief by reformation, even after the action at law on the instrument in question has been defeated and the relief will be complete; that is on satisfactory proof, the instrument will be reformed and damages adjudged. The judgment at law is res adjudicata as to only such facts as are in issue in the suit at law, and the suit at law by its very nature is almost never competent to investigate the merits of the plaintiff's claim and is therefore not conclusive on him in his suit in chancery."**

In citing the case of *Siegfried vs. R. R. Co.,* 50 O. S. 294, at page 19, petitioner fails to distinguish between the use of the word "action" and the use of the term "cause of action." It will be noted in the quotation on page 19 that the Supreme Court of Ohio used the word "action" and not the term "cause of action." **The statute, Sec. 11233 G. C., uses the word "action," not the term "cause of action," when it declares that the plaintiff "may commence a new action within one year after such date," etc.**

The word "action" is likewise used in *Frost vs. Blatz*, 23 O. A. 40, cited by petitioner on page 19.

In the case at bar, the new action is the same as the first action; it is an action to recover upon the insurance policy. As stated by Justice Holmes in *Grand View Building Co.* case: "The plaintiff in the former action expressed on the record its reliance upon the facts upon which it now relies." The respondent herein sought to recover in both actions upon a policy or contract of insurance which insured an elevator building that was located on leased land.

Fallacy of Petitioner's Claim That Section 11233 Does Not Apply Where the First Action at Law is Changed to Include, in a Second Action, a Prayer for Equitable Relief (p. 20).

Petitioner claims that Section 11233, G. C., applies only if the same remedy or same "cause of action," used in its narrow sense, is pursued in the second action. That, of course, is not true. The second action might be *res adjudicata* if exactly the same remedy or the same "cause of action" were again pursued. It is because a different remedy is needed, it is because the first action failed otherwise than upon its merits, that Section 11233, G. C., gives relief. Otherwise, that statute would afford no relief whatever in cases which were decided against plaintiff on account of his mistake in choice of remedy.

In *Ruling Case Law*, Vol. 15, p. 855, par. 431, the law is well settled as follows:

> "It is not the mere recovery in a prior action that constitutes a bar or estoppel, but the decision upon the merits of the question in dispute between the parties and in order to be conclusive as an estoppel, or a bar under the doctrine of *res adjudicata*, the general rule is that a judgment must have been rendered on the merits of the case. If the real merits

of the suit are not determined in the prior decision the judgment will not be a bar. Considerable confusion has, however, arisen from the indefinite use of the expression 'upon the merits.' A judgment against the plaintiff on the merits, in the broadest sense of the expression, determines that he has no cause of action against the defendant. In a more restricted sense, the words are sometimes used to indicate that he cannot recover in the particular form of action. In the first instance he is permanently out of court, while in the second, he may restate his case so as to include the cause of action that he has. But he cannot claim a right in that action to have the precise question theretofore decided against him again determined by the court, unless a re-examination has been regularly ordered."

The Alleged "Dilemma."

(b) (Page 21) We are unable to see how the court below impaled itself upon any horns of a dilemma, as stated by the petitioner. The cause of action in the second suit, in a narrow sense or in the old common law use of the expression, was not precisely the same cause of action as in the first suit; that is to say, it was not the same remedy. In Ohio, we have but one action which is called a "civil action." The word "action," as used in Section 11233, G. C., necessarily refers to a "civil action."

In the case of *Hart vs. Andrews*, 103 O. S. 218, the Supreme Court of Ohio discussed the purpose and policy of the legislature of Ohio in simplifying our procedure and in getting away from technical forms of action. We quote from the opinion at page 227 as follows:

> "The plain purpose of the general assembly by this provision was to abolish all these antiquated, technical forms of action, and the strict construction with which courts had adjudicated concerning them, and to substitute therefor, first, the facts, setting forth 'an injury' in ordinary and concise language, and, second, 'the relief' demanded.

> "The game of strategic, technical, shuttlecock pleading, to defeat substantial rights based on principles, was to be forever banished from our Ohio jurisprudence.
>
> "Unfortunately, many of the old courts called upon to construe the new code were out of sympathy with it and did their best to bleed it to death; but the plain provisions of the statute, notwithstanding these adverse decisions, must nevertheless control."

Section 11239 of the General Code of Ohio provides as follows:

> "**There shall be but one form of action, to be known as a civil action.** This requirement does not affect any substantive right or liability, legal or equitable."

The first action failed otherwise than upon its merits and Section 11233, G. C., was intended to give relief and does give relief on account of such failure. The cases of *Larwill vs. Burke, Piscopo, Admr., vs. Railway Co., Brown vs. Erie Railroad Co.* all use the word "action," not "cause of action." As before stated, petitioner fails to distinguish between the use of the term "cause of action" in its narrower sense, or in its meaning as a remedy, and the term "cause of action" in its broad sense, where it is sometimes used to mean "action."

In *Brown vs. Erie Railroad Co.*, 176 Fed. 545 (pp. 22-23), as in our case, the parties and the injury were the same, and the facts pleaded were the same in the second action as in the first action. As stated by Justice Holmes in *Northern Assurance Co. vs. Building Assoc.*, 203 U. S. 106:

> "The plaintiff in the former action expressed on the record its reliance upon the facts upon which it now relies."

There is Nothing in Sec. 11233 G. C. to Warrant the Assertion That It Applies Only to Statutory Limitations and Not to Contractual Limitations. (P. 24.)

Judge Hicks disposes of the contentions of petitioner with respect to the case of *Prudential Insurance Co. vs. Howle* (Rec. 158, 159, 160), decided in 1899. That case has never been reviewed in any manner by the Supreme Court of Ohio and it has never been judicially recognized by any court in Ohio since its decision except by the Honorable District Judge who tried the case at bar. A superficial reading will reveal that the statement to the effect that Section 11233 did not apply to contractual limitations was purely *obiter dictum.* The case of *Cortesi vs. Ins. Co.,* 250 C. C. (N.S.) 509, was decided in 1916. The majority opinion ignored the *Prudential Ins. Co. vs. Howle* case and even the dissenting judge did not consider it applicable or worthy of mentioning. The dissenting opinion rested chiefly upon the *Riddlesbarger vs. Hartford Fire Ins. Co.* case. We have already shown why that case is inapplicable to the case at bar as well as contrary to Ohio jurisprudence.

Even if the respondent did not have the benefit of Section 11233 of the General Code, equity would nevertheless give relief in such a case as we have under consideration. The plaintiff brought his action originally at law, under the well-known principle that equity will not furnish relief where an adequate remedy exists at law. He based his petition upon the leading Ohio case of *Foster vs. Ins. Co.* (*supra*) and the case of *Hanover Fire Ins. Co. vs. Dallavo,* 274 Fed. 258 (6th Circuit, Ohio), which had never been reversed and which were substantially similar cases. Those cases permitted the application of the doctrine of estoppel. However, at that time, general federal jurisprudence was to the contrary, and after the removal of the case from the state court to the District Court, federal jurisprudence con-

trolled. Under it, plaintiff had chosen the wrong remedy; whereas under the state law, and the law of the circuit in which Ohio was situated, he had chosen the correct remedy. Later, in 1938, it was adjudicated by the Supreme Court of the United States in *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64, that the federal courts should apply the statutes and laws of the state and not the general federal law. If *Erie Railroad Co. vs. Tompkins* had been decided earlier and the District Court had applied the law of *Foster vs. Ins. Co.* (*supra*), plaintiff would, of course, have won his case in the first action at law.

Under these circumstances, why should not chancery come to the relief of plaintiff who has been diligent throughout these many years in the prosecution of his suit and who has been denied final justice only because the law of *Erie Railroad Co. vs. Tompkins* was not sooner announced? Under these circumstances, also, equity can and should sweep aside any contractual or statutory limitation in order to grant adequate relief and render complete justice. It would be an intolerable condition if, under our law, a man could not secure his rights who did everything he was required to do under the law as announced in similar cases at the time of his taking action.

Controlling Case of Insurance Co. vs. Leslie.

The leading case of *Insurance Company vs. Leslie*, 47 O. S. 409, contains in its opinion a complete answer to both defenses that were set up in defendant's answer herein. The Supreme Court of Ohio in this case construed Section 3643, R. S. (now Section 9583 of the General Code of Ohio), and declared the law of this state on page 416 in the following language:

> "The statute rests upon considerations of public policy; one of its purposes being, to exact of insurance companies doing business in this state,

reasonable diligence and care to avoid improper risks, and over-insurance, by requiring their agents to make personal examination of the property, and fix its insurable value, before writing the insurance. Well regulated companies, after such examination, would not take the risk if not a proper one, nor write a policy for an amount greater than the actual value of the property. The more effectually to accomplish this purpose, the statute has provided, that the company shall be liable on its policy, unless a change subsequently occurs increasing the risk, without its consent, or the assured has been guilty of intentional fraud; and, that in case of total loss, the company shall abide by the valuation it has placed upon the property. Under the rule of liability thus established by the statute, responsible companies are less likely to take risks recklessly, or for a sum greater than the value of the property; **and persons whose buildings are insured, receive protection against the injustice resulting from merely technical defenses, founded upon the many conditions inserted in the policy, formerly resorted to. The statute cannot, we think, be treated as conferring upon the assured a mere personal privilege which may be waived or qualified by agreement. It has a broader scope. It moulds the obligation of the contract into conformity with its provisions, and establishes the rule and measure of the insurer's liability. Terms and conditions embraced in the policy inconsistent with the provisions of the statute, are subordinate to it, and must give way.** Of this character are the stipulations that the loss or damage shall be estimated according to the true value of the property at the time of the fire, and that no suit shall be maintained until the amount shall be fixed by an award. These being in conflict with the statute, and therefore inoperative, the averments of the answer with respect to them were ineffectual as a defense, and evidence in support of them, was inadmissible. **And the statements in the application, of the value of the property, and its condition, in regard to which the company should have been informed by the examination the statute required it to make, were immaterial, upon which the insurer had no right to rely, and could not be fraudulent.''**

Cases in Ohio which cited and followed the law as laid down in *Insurance Co. vs. Leslie* (*supra*) include the following:

United Firemen's Ins. vs. Kukral, 7 O. C. C. 356 (Aff'd by Supreme Court in 51 O. S. 609).

People's Mutual Fire Ins. Co. vs. Bowersox, 5 C. C. 449.

Webster vs. Dwelling House Ins. Co., 35 W. L. B. 15.

Insurance Co. vs. Hull, 51 O. S. 278.

Insurance Co. vs. Drackett, 63 O. S. 54.

Cincinnati vs. Pub. Utilities Comm'n, 98 O. S. 326.

Moody vs. Ins. Co., 32 W. L. B. 405.

Sun Mutual Ins. Co. vs. Hock, 8 C. C. 344.

Dwelling House Ins. Co. vs. Webster.

Insurance Co. vs. Luce, 11 C. C. 480.

Quoting from the opinion in *United Firemen's Ins. Co. vs. Kukral* (*supra*):

> "This very case has been before us before this proceeding in error upon this question, and we then decided, as we do now, that there may have been a mortgage upon the insured premises, and in that sense the ownership may not have been entire, unconditional and sole; **and yet the plaintiff may be entitled to recover under Section 3643 (now Sec. 9583 G. C.) which has made an entire change in policies of fire insurance and in the law to be administered in such suits.**"

Section 9583, General Code of Ohio (formerly Sec. 3643 R. S.) provides as follows:

> "A person, company or association insuring any building or structure against loss or damage by fire or lightning, by renewal of a policy, shall cause such building or structure to be examined by his or its

agent, and a full description thereof to be made, and its insurable value fixed, by him. In the absence of any change increasing the risk without the consent of the insurers, and also of intentional fraud on the part of the insured, in case of total loss, the whole amount mentioned in the policy or renewal upon which the insurer received a premium, shall be paid."

The foregoing statute together with the interpretation given to it by the Supreme Court of Ohio and the inferior courts, in the cases above cited, furnishes a complete reply to the defenses made by the petitioner. We have only to cite to this Honorable Court the well-known and controlling case of *Erie Railroad Co. vs. Tompkins,* 304 U. S. 64, in order to establish the unassailable right of the respondent to recover upon the renewal insurance policy issued by the petitioner. The judgment of the United States Circuit Court of Appeals was altogether just and righteous. The petition for writ of *certiorari* herein should be denied.

VIII. CONCLUSION

In conclusion, there appears to be no good reason why this case should be admitted to the Supreme Court. The opinion of the Circuit Court of Appeals is sound and in accordance with the established law of Ohio. The policy of Ohio law, as declared in *Insurance Company vs. Leslie,* to subordinate the contract of insurance to the statutes in force at the time the policy was issued requires that Sections 11233 and 9583, General Code, be given full force and effect. Under the law as announced in *Erie Railroad Co. vs. Tompkins,* the Circuit Court of Appeals was authorized to apply, and it did apply, that policy and the Ohio decisions and statutes to the issues in the case at bar. It also effectively applied the rules laid down in the leading and

very similar case of *Northern Assurance Co. vs. Building Ass'n.*

Finally, we maintain that the decision of the Circuit Court of Appeals restores the insurance business to the plane of fair dealing from which it was tottering. It will be welcomed by most insurance companies and will be of incalculable benefit to both insurers and insured. It will strengthen confidence in insurance everywhere.

Fair dealing is a prime essential of our American system. In insurance it is basic. Public confidence in the integrity and fair dealing of insurance companies is indispensable. That confidence would be utterly destroyed if our courts should look with favor upon and give vitality to such defenses as were made in the case at bar. The law abhors forfeitures.

Respectfully submitted,

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